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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN POWELL, ET AL., PETITIONERS

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of the nonstatutory labor exemption from the federal antitrust laws after a collective bargaining contract has expired and the parties have reached an impasse in negotiations over a new contract.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are professional football players [1] who claim that respondents, the National Football League (NFL) and its member teams, have violated the federal antitrust laws by maintaining rules restricting the ability of players to move freely among teams after the expiration of a multi-employer collective bargaining agreement containing such rules. Respondents contend that their rules are immune from antitrust scrutiny under the nonstatu-

[1] The players' union is also named as a plaintiff in the complaint. After the court of appeals' decision, the union announced that it was abandoning its collective bargaining functions, Pet. Reply Br. 2 n.1, and it is not a named petitioner before this Court.

tory labor exemption to the antitrust laws recognized by this Court in *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), and *Connell Construction Co.* v. *Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

On cross-motions for summary judgment, the district court held the nonstatutory labor exemption applicable only until negotiations over the restraints on player mobility had reached impasse; it subsequently found that the parties had reached impasse and that, accordingly, the exemption no longer immunized respondents' conduct. Before petitioners' antitrust challenge could be tried on the merits, respondents appealed the district court's interlocutory order to the court of appeals pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, holding that the antitrust exemption continued after impasse as long as "the labor relationship continues." Pet. App. 18a.

1. Restrictions on the ability of players to move among teams have long been a source of tension between respondents and the players. Understanding the legal dispute over the current system necessitates a brief discussion of its predecessor.

The "Rozelle Rule," in effect from 1963 to 1976, generally required a team signing a contract with a player formerly employed by another team to pay compensation to that team as set by the Commissioner. That compensation, in the Commissioner's discretion, could include one or more players or future draft choices from the acquiring team. Pet. App. 37a n.3. Fear of losing veteran players or first-round draft choices discouraged teams from hiring players who had worked for other teams. From 1963 to 1976, only four players signed with other teams after their contracts expired. P. Staudohar, *The Sports Industry and Collective Bargaining* 87-88 (2d ed. 1989).

In 1974, differences over player mobility led the players' union to call a strike. R. Berry, W. Gould & P. Staudohar, *Labor Relations in Professional Sports* 125

(1986). Although most players initially complied with the strike call, rookies and free agents reported to training camp. After 44 days, the strike was broken and the remaining strikers returned to camp. *Id.* at 97.

The players nonetheless continued to challenge the Rozelle Rule in court. *Mackey* v. *NFL*, 407 F. Supp. 1000 (D. Minn. 1975), modified and affirmed, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). In *Mackey*, the players contended (and the district court agreed) that the Rozelle Rule was a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, because it constituted an employer-imposed group boycott or refusal by teams to deal with the players. 407 F. Supp. at 1005, 1009-1010. On appeal, the Eighth Circuit agreed that the Rozelle Rule violated the Sherman Act, but analyzed the restraint under the Rule of Reason. 543 F.2d at 620-622.

2. Although the defendants in *Mackey* insisted that the Rozelle Rule did not violate the Sherman Act, their principal contention then, as now, was that restrictions imposed on player mobility are immune from Sherman Act scrutiny under the nonstatutory labor exemption to the antitrust laws.

The nonstatutory exemption to the federal antitrust laws is now well established in our law. It is entirely a judicial construct. This implied exemption "has its sources in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. To be sure, Congress has provided labor a *statutory* exemption from the antitrust laws. But that exemption only immunizes the existence of unions and certain activities undertaken by unions acting unilaterally and in their own interests to eliminate competition in the labor market. See Clayton Act §§ 6, 20, 15 U.S.C. 17, 29 U.S.C. 52; Norris-LaGuardia Act, 29 U.S.C. 104, 105, 113; see also *Connell*, 421 U.S. at 621-622; *United States* v. *Hutcheson*, 312 U.S. 219 (1941). The statutory labor exemp-

tion does not extend to "concerted action or *agreements between unions and nonlabor parties.*" *Connell*, 421 U.S. at 622 (emphasis added); see *Hutcheson*, 312 U.S. at 232. For that reason, the statutory exemption does not insulate even a collective bargaining agreement from the antitrust laws. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 662 (1965).

To "accommodat[e] * * * the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622, this Court has concluded that the antitrust laws must recognize a further *nonstatutory* labor exemption applicable to certain conduct in which employers participate. Not only are "some union-employer agreements * * * accorded a limited nonstatutory exemption from antitrust sanctions," *ibid.*, but collective bargaining agreements eliminating competition among employers in a multi-employer bargaining unit with respect to terms of employment are also generally immune from the antitrust laws under the nonstatutory exemption, see *ibid.*; *Jewel Tea*, 381 U.S. at 689-690; *Pennington*, 381 U.S. at 664-665.

In *Mackey*, the Eighth Circuit held that the nonstatutory labor exemption did not shield the Rozelle Rule from the Sherman Act because the Rule was unilaterally imposed by the NFL and thus was not "the product of bona fide arm's-length negotiation." 543 F.2d at 615. The court of appeals found substantial evidence to support the district court's conclusion that "the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule." *Ibid.*; see *id.* at 615-616.

3. As a "direct result" of their victory in *Mackey* and another case, *Alexander* v. *NFL*, 1977-2 Trade Cas. ¶ 61,730 (D. Minn. 1977), the players and their union achieved "a multimillion dollar cash settlement and the owners' promise to negotiate a new collective bargaining

agreement." R. Berry, W. Gould & P. Staudohar, *supra*, at 98. In 1977, the players' union and the NFL signed a collective bargaining agreement that, among other things, replaced the Rozelle Rule with the Right of First Refusal/Compensation system which the players challenge in this litigation. Under the new system,

> every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's old team may keep the player simply by matching the competing offer; the player's old club therefore is said to have a "right of first refusal" as to the player's services. If the competing offer is large enough, and the club to which the player was previously under contract does not choose to match a competing offer, the old club will receive draft choice "compensation" which may be extremely costly to the acquiring club.

Pet. App. 37a.

Although the Right of First Refusal/Compensation system is characterized by less discretion than the Rozelle Rule—for example, the system quantifies the compensation payable in future draft choices by reference to the acquired player's experience and salary level, rather than leaving it to the Commissioner's judgment in each case—the mobility of players subject to the rule did not increase substantially. Pet. App. 39a. At the expiration of the 1977 contract in 1982, therefore, the players' union mounted a 57-day strike. At the conclusion of the strike, the system was modified by increasing the salary level at which draft choice compensation was triggered.

The modified rule incorporated in the 1982 collective bargaining agreement, however, did not produce the mobility for which the players hoped. Pet. App. 39a.[2] When

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[2] From 1977 to 1987, only one free agent signed with another team. P. Staudohar, *supra*, at 89.

the 1982 contract expired in 1987, the players' union sought further modifications in the Right of First Refusal/Compensation system. Negotiations failed to reach an accord on that issue, and the players' union called another strike. After 24 days, the strike was broken and the players resumed work without a contract. No contract has since been signed. Pet. App. 40a.

4. On the day the 1987 strike ended, petitioners and the players' union filed suit against respondents, claiming, *inter alia*, that the Right of First Refusal/Compensation system violates Section 1 of the Sherman Act, 15 U.S.C. 1.[3] Petitioners moved for partial summary judgment and an injunction against respondents' continued implementation of the Right of First Refusal/Compensation system. Pet. App. 35a, 40a. Respondents filed a cross-motion for summary judgment seeking a declaration that the challenged restraints were immune from antitrust scrutiny by virtue of the nonstatutory labor exemption. *Id.* at 35a, 43a.

On January 29, 1988, the district court ruled that the player restraints, having been included in the 1982 labor contract as a result of good faith collective bargaining, were exempt from the antitrust laws by virtue of the nonstatutory labor exemption for the duration of the contract. It further ruled that the exemption continued after "expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*." Pet. App. 54a; see *id.* at 47a-50a. Impasse is the point at which the parties, "following intense, good faith negotiations," have "exhausted the prospects of concluding an agreement." *Id.* at 54a. Because the National Labor Relations Board was then considering whether negotiations had reached impasse, in connection with the NFL's charge that the union was not bargaining in good faith, the district court stayed proceedings until the Board ruled. *Id.* at 56a-57a.

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[3] The players also challenged the College Draft and the standardized Player Contract. They sought injunctive relief and damages on all counts.

The Board's General Counsel thereafter concluded that the parties had reached a "bona fide impasse in negotiations," and therefore dismissed the NFL's charge (and an amended charge). *NFL Players' Ass'n*, Case 2-CB-12117, Advice Mem. at 8. On June 17, 1988, the district court, "accord[ing] some weight" to the General Counsel's views, 6/17/88 Tr. 3-4, agreed that the parties had reached an impasse on the issue of player restraints and therefore held that continued imposition of those restraints would be subject to the antitrust laws. *Powell* v. *NFL*, 690 F. Supp. 812, 814 (D. Minn. 1988). The district court denied petitioners' motion for a preliminary injunction, however, in light of the requirements of the Norris-LaGuardia Act (which generally prohibits the courts from granting injunctions in labor disputes, 29 U.S.C. 101, 107) and the court's own determination that an injunction would "irreparably harm the owners and have a deleterious effect upon professional football generally" and "wholly subvert the collective bargaining process." 690 F. Supp. at 816, 817.

On January 6, 1989, the district court granted respondents' motion to certify its January 29, 1988, order for interlocutory appeal under 28 U.S.C. 1292(b). That order was recertified, at respondents' request, on February 17, 1989.

5. The court of appeals accepted the interlocutory appeal. In a divided ruling, it reversed the judgment of the district court and remanded with instructions to enter judgment for respondents.

The majority disagreed with the district court that the nonstatutory labor exemption ends at impasse. It noted that impasse in labor negotiations is common and usually temporary, Pet. App. 9a-10a, and that bargaining is governed by "a comprehensive array of labor law principles" both before and after impasse, *id.* at 12a-13a, 15a. In addition, "disputes over employment terms and conditions are not the central focus of the Sherman Act." *Id.* at 13a. Having accepted the "level playing field" of

the labor arena, the court concluded, the parties should be required to continue to fight on it, "so that bargaining and the exertion of economic force may be used to bring about legitimate compromise." *Id.* at 17a.

The court acknowledged that respondents had modified the Right of First Refusal/Compensation system (by reducing the number of players to which it applied) after the district court found that the parties had reached an impasse in negotiations over player restraints. Pet. App. 17a & n.10. In spite of the unilateral nature of this change, the court of appeals ruled that the players and their union could not challenge the modified system because they did not contend that respondents had proposed or implemented the change in bad faith. *Id.* at 17a. Although the court insisted that "this does not entail that * * * management is forever exempt" from the antitrust laws, it refused to "look into the future and pick a termination point." *Id.* at 17a-18a. The court was "satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies." *Id.* at 18a.

Senior Circuit Judge Heaney dissented. He agreed with the district court that the labor exemption terminates at impasse. Pet. App. 21a. In his view, "the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights." *Id.* at 23a.

The court of appeals, by a 7-2 vote, denied rehearing en banc. Chief Judge Lay and Judge McMillian dissented from that denial on the ground of a conflict with *Mackey*. Pet. App. 27a-32a.

DISCUSSION

This case presents a difficult question of first impression in this Court: whether, and for what period after a collective bargaining agreement expires, the nonstatutory labor exemption to the antitrust laws shields a labor market restraint embodied in the expired agreement. The answer to that question is not supplied by this Court's decisions in *Pennington*, *Jewel Tea*, or *Connell*. Each of those cases determined whether the nonstatutory labor exemption immunized from antitrust scrutiny a challenged restraint incorporated in a collective bargaining agreement. This case presents the different, but related, question whether such an "exemptable" restraint remains insulated from the antitrust laws after the collective bargaining agreement expires.

As in this Court's earlier cases, resolution of that question requires harmonization of the fundamental national policies embodied in the labor laws and the antitrust laws. This Court repeatedly has recognized that, while "[t]he basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act * * * and the Norris-LaGuardia Act, * * * a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell*, 421 U.S. at 621-622; see *id.* at 621-623; cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504-513 (1988).

In order to avoid improper intrusion into the legislative policymaking role, the courts, in fashioning this "limited nonstatutory exemption," should be mindful of the principle that implied exemptions to the antitrust laws are disfavored. In consequence, those judicially created exceptions to the critical mandate of the antitrust laws should be no broader than clearly necessitated by

the public policy requiring their recognition. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980); *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In light of these principles, we believe that the court of appeals correctly rejected respondents' suggestion that the antitrust laws have no role to play with respect to pure labor market restraints. At the other extreme, the lower courts were likewise correct to reject petitioners' contention that the antitrust laws become applicable immediately upon expiration of the collective bargaining agreement if the union does not consent to continuation of a restraint. But while the court of appeals correctly rejected the polar positions pressed by the parties, its own formulation of the nonstatutory labor exemption was, we believe, overly expansive.

1. Respondents suggest that, because only a labor market restraint is involved, it should make no difference to the antitrust exemption whether an employer, a union, or both in concert seek to eliminate competition. Citing *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), respondents submit that the antitrust laws are not concerned with restraints on competition in labor markets, if there is no effect on a "product market." Br. in Opp. 14-15. The Court in *Apex*, relying on Section 6 of the Clayton Act, 15 U.S.C. 17, observed that "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." 310 U.S. at 502-503.

But the Court's statement in *Apex* was made in a suit by an employer against a union and its officials. And Section 6 of the Clayton Act, although it provides that

"[t]he labor of a human being is not a commodity or article of commerce," focuses on protection of unions and expressly immunizes from the antitrust laws only the existence of unions and certain union activities. The federal courts therefore have generally concluded (correctly, in our view) that neither *Apex* nor Section 6 puts collective action by employers to restrict competition in a labor market outside the scope of the antitrust laws. See, *e.g.*, *Mackey*, 543 F.2d at 616-618; *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979); *Gardella* v. *Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.); *id.* at 413 (Frank, J.); *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), aff'd in part, rev'd in part, 593 F.2d 1173 (D.C. Cir. 1978); *Cordova* v. *Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970). Those decisions comport with decisions of this Court that, while not referring specifically to the labor exemption, hold that employees may raise antitrust challenges to collective employer action with respect to terms of employment. *Radovich* v. *NFL*, 352 U.S. 445 (1957); *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926). The court of appeals thus properly rejected respondents' suggestion that employer-imposed restraints affecting only labor markets are beyond the scope of the antitrust laws.

2. The court of appeals was also correct to reject petitioners' contention that the nonstatutory labor exemption protects only restraints to which the union currently agrees—a position that would dictate termination of the nonstatutory labor exemption immediately upon expiration of a collective bargaining agreement (at least if the union has made it clear that it will not agree to continuation of the provision). See Pet. 12; Pet. Reply Br. 5. That view affords insufficient deference to the "federal policy favoring collective bargaining." *Connell*, 421 U.S. at 626. In particular, it cannot be reconciled with the obligation of employers under the labor laws to maintain the terms of employment established by an ex-

pired collective bargaining agreement until impasse. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). If the antitrust exemption were withdrawn before impasse, and employers feared that continued adherence to particular terms pending negotiation of a new agreement would constitute an antitrust offense, they could find themselves in a dilemma: modify the objectionable terms (and risk committing an unfair labor practice, because the NLRA forbids unilateral changes in working conditions prior to impasse, see *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)); or adhere to the terms (and risk treble damages under the antitrust laws).

It is true that employers would not violate the labor laws by unilaterally changing terms and conditions of employment prior to impasse with union concurrence. But allowing the union to dictate termination of the antitrust exemption upon contract expiration would tend to undermine the collective bargaining process. When unions and employers agree to a contractual provision, they know that it will continue in effect at least until impasse, should the current contract expire before a new contract is negotiated. That expectation plays an important role in facilitating collective bargaining. "'Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.6 (quoting court of appeals' opinion). Terminating the antitrust exemption immediately upon expiration of the collective bargaining agreement would gratuitously intrude force before the opportunity for a non-coercive solution has been exhausted. See *Bridgeman* v. *National Basketball Ass'n*, 675 F. Supp. 960, 965-966 (D.N.J. 1987). Accordingly, the courts below correctly held that

the nonstatutory labor exemption should continue after the contract expires.[4]

3. a. We believe, however, that the court of appeals erred in holding that the nonstatutory labor exemption continued indefinitely beyond impasse. The court of appeals reasoned—in light of the "comprehensive array of remedies" provided by labor law "to management and union, even after impasse," Pet. App. 15a—that the nonstatutory labor exemption must protect any restriction "conceived in an ongoing collective bargaining relationship." *Id.* at 18a.[5] Although the court of appeals asserted that it was not holding that management was "forever exempt," its opinion suggests no point short of the end of the "ongoing collective bargaining relationship" at which the exemption would terminate. *Id.* at 17a-18a. Although this view would obviously be within the broad range of policy choices available to Congress, it is not properly confined as an implied exemption necessitated by the labor policy Congress has thus far enacted.

Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the Norris-LaGuardia Act)

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[4] This case does not present the question whether the nonstatutory labor exemption reaches restraints to which the union has never agreed. Petitioners do not dispute that the 1982 agreement was a collective bargaining agreement negotiated at arm's length and in good faith.

[5] It included in that category the modifications to the player restrictions imposed by the respondents without union agreement. Pet. App. 17a & n.10.

is to expand the protection afforded employees. While the labor laws are, of course, designed to promote and encourage the process of collective bargaining, there is insufficient suport in that general statutory policy for the court of appeals' conclusion that an antitrust exemption should shield an employer-imposed restraint that originated in an expired contract as long as the collective bargaining relationship exists. As a policy judgment, Congress could reasonably conclude that so comprehensive an exemption is desirable and should be enacted. But the role of the courts is not similarly to choose among rational predictive policy alternatives; it is instead to fashion an implied exemption no broader than clearly necessary to the successful functioning of the statutory scheme.

b. On the other side of the scale weighs the antitrust laws' proscription of anticompetitive restraints. The immunity conferred by the nonstatutory labor exemption is of significance principally where the challenged restraints would otherwise violate the antitrust laws. By hypothesis, then, we should assume—as the Eighth Circuit found in *Mackey*—that restrictions on player mobility injure the players in their business or property under the antitrust laws.[6]

We should also recall (see p. 9, *supra*) that restrictions on player mobility are not exempt from the antitrust laws, but only "exemptable" by means of a collective bargaining agreement. For that reason, the prospect of vulnerability to an antitrust claim is not an alien element that would be introduced into the collective bargaining process for the first time upon termination of the implied

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[6] There has been no finding in this case that the Right of First Refusal/Compensation system violates the Sherman Act, and we express no opinion on that issue. In *Mackey*, however, the Eighth Circuit found "ample evidence to support the district court's findings that plaintiffs have been injured in their business or property" by the Rozelle Rule, which preceded the Right of First Refusal/Compensation system at issue in this litigation. 543 F.2d at 623.

exemption. To the contrary, the value of the nonstatutory labor exemption is one of the benefits the respondents bargained for and received when the parties signed the 1977 collective bargaining agreement. In the absence of that agreement, the Right of First Refusal/Compensation system would have been open to challenge under the Sherman Act, just as the Rozelle Rule had been challenged (successfully) in *Mackey*. By incorporating the Right of First Refusal/Compensation system into the 1977 collective bargaining agreement, respondents purchased antitrust immunity, presumably in exchange for an agency shop, pension and insurance benefits, or some other consideration valued by the players. In essence, the players bargained away their antitrust chose in action (and the ongoing injury they presumably suffered) as a quid pro quo for compensation in some other form.

By extending the nonstatutory labor exemption past the time when the employers may unilaterally diminish or rescind elements of that quid pro quo (as they are permitted to do after impasse has been reached), the court of appeals has created an inherently destabilizing asymmetry between the initial collective bargaining agreement and all successor agreements. Its rule effectively gives the party benefitting from a potentially anticompetitive restraint (the respondents, in this case), the benefit of the antitrust exemption without having to pay for it. As Circuit Judge Heaney pointed out in dissent, "the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table." Pet. App. 25a.

Under the rule adopted by the court of appeals, the party burdened by the anticompetitive restraint (in this case, the players, as represented by their union) would apparently be relegated to three unsatisfactory options: (1) accede to the other side's terms (which are unlikely to represent a legitimate compromise because the other side is unlikely to pay for an antitrust exemption it can continue to enjoy for free); (2) call a strike (albeit with

diminished chance of success because one of the levers available to achieve the initial contract—the credible threat of antitrust damages—is removed by perpetuation of the nonstatutory labor exemption after impasse); or (3) terminate the collective bargaining relationship and start from scratch. It is questionable whether that result is even appropriately compatible with the policies of the labor laws. It surely is not sufficiently essential to the successful implementation of those policies to warrant a judicial finding of an implied exemption from the normal operation of another duly enacted Act of Congress (the Sherman Act).

c. An analytically logical point for termination of the implied immunity flowing from an expired collective bargaining agreement is when the parties have reached an impasse in their negotiations over a new collective agreement. "The definition of 'impasse' is understandable enough—that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. at 543 n.5 (quoting R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 448 (1976)). At impasse, additional tools, economic and legal, are ordinarily brought into play to prompt the parties to reconsider their positions and come to an understanding. For example, employers are free under the labor laws to make unilateral changes in the terms of employment after impasse, so long as the changes have been offered as good faith proposals in bargaining. *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404, 415-416 n.9 (1982). Such unconsented changes, if made prior to impasse, would be unfair labor practices remediable in Board proceedings. Moreover, members of a multi-employer bargaining unit are free to negotiate individual agreements on an interim basis with the union after impasse. *Ibid.* Since the labor laws authorize and contemplate independent employer action and changes in the

terms of employment at impasse, labor policy no longer requires that employers be comprehensively shielded from the antitrust laws if they elect collectively to maintain or enforce provisions inconsistent with the antitrust laws after that time.

Although impasse therefore seems the theoretical fulcrum for termination of the implied immunity, certain practical difficulties would be presented by a rule dissolving the immunity immediately upon impasse. It is not always clear even in retrospect—and certainly not always immediately clear to the parties—precisely when impasse occurs. Moreover, the labor laws, which are designed to promote collective bargaining and which prohibit unilateral change before impasse but allow it after impasse, seem to prefer caution, rather than prematurity, in concluding that further bargaining is futile. For these reasons, there is justification in labor policy for the implied immunity to endure after impasse for such time as would be reasonable in the circumstances for the employer to take steps to ascertain, upon advice of counsel, that impasse has in fact occurred and to adjust his business operations so as to eliminate the previously immunized restraint.

In no event, however, should immunity continue once the employer has made a unilateral, post-impasse change in the provision at issue. Adoption of such a change (which would constitute an unfair labor practice if made prior to impasse) amounts to a tacit admission that the employer (1) has concluded that impasse has occurred and (2) has had sufficient time to act on that conclusion. Here, respondents' unilateral modification of the Right of First Refusal/Compensation system (see p. 8, *supra*) appears to be just such a unilateral change.

4. The court of appeals' decision, although erroneous, does not conflict with any decision of this Court, nor is there a conflict in the circuits. Moreover, reconciliation of the two fundamental and potentially inconsistent national policies embodied in the antitrust laws and the

labor laws necessarily involves some speculation about the practical operation of the collective bargaining process. Thus, the issue involved in this case is one on which additional experience in the lower courts could shed light.

At the same time, the court of appeals' error is a matter of serious consequence. Its unjustified extension of the nonstatutory labor exemption is likely to destabilize labor-management relations and make collective bargaining agreements more difficult to reach. The potential for mischief is quite broad. It includes professional football, which is a multi-billion dollar business, and professional hockey and basketball, where the leagues also impose restraints on player movement. See *Bridgeman* v. *National Basketball Ass'n, supra; Philadelphia World Hockey Club Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).[7] It includes the entertainment industry generally, which has an economic structure similar to professional sports.[8] And it conceivably includes the more than 600 collective bargaining relationships involving multi-employer associations, which in turn

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[7] Professional baseball presumably is unaffected, since it is not subject to the antitrust laws. *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

[8] According to Professor Staudohar, "professional sport is clearly within the ambit of the organized entertainment industry in its industrial relations structure." P. Staudohar, *supra*, at 6-7. "Both [the entertainment industry and professional sports] are subject to the 'star system,' in which exceptionally talented people dominate the worker hierarchy." *Id.* at 7. Like professional league sports, the entertainment industry is characterized by multi-employer bargaining units. See, *e.g.*, *American Broadcasting Co.* v. *Writers Guild*, 437 U.S. 411, 413-414 (1978) (describing the Association of Motion Picture & Television Producers, Inc., the multi-employer bargaining association representing motion picture and television film producers); *IATSE, Local 659*, 197 N.L.R.B. 1187, 1188 (1972) (describing the Association of Motion Picture Producers, Inc., a multi-employer bargaining unit representing 70 employer-producers), enforced, 477 F.2d 450 (D.C. Cir. 1973); *Barr* v. *Dramatists Guild, Inc.*, 573 F. Supp. 555, 557 (S.D.N.Y. 1983) (describing The League of New York Theaters and Producers, Inc., a multi-employer bargaining unit of theater producers, owners, and operators in New York City).

cover more than three million employees. Pet. App. 63a-65a.

Although the district court's order is interlocutory, no issues remain to be resolved on remand that bear on when the nonstatutory labor exemption terminates. Nor will resolution of those issues develop a record that will aid in resolution of that issue. Neither respondents (in appealing to the court of appeals), nor petitioners (who seek review in this Court), have identified any further fact finding necessary to determine the proper accommodation of labor and antitrust policies. We therefore believe that the interlocutory nature of the court of appeals' decision is no obstacle to this Court's review. Cf. *Kansas & Missouri* v. *Utilicorp United, Inc.*, 110 S. Ct. 2807, 2811 (1990). Finally, it is unlikely that a contract settlement will be reached since the players' union has foresworn its status as bargaining representative.[9] On balance, we believe that the petition presents a question of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace, that the Court should not await emergence of a conflict in the circuits before granting review.

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[9] On November 6, 1989, five days after the panel's decision, the players' union wrote to the NFL that it "has voted to abandon bargaining rights and begin the decertification process." Pet. App. 62a. On March 30, 1990, the NFL filed suit in district court for a declaratory judgment that the players' union's "purported decertification and abandonment of bargaining rights is ineffective to terminate the labor exemption recognized by the Eighth Circuit." Complaint for Declaratory Judgment at 19, *The Five Smiths, Inc., et al.* v. *National Football League Players Ass'n*, No. 4-90-CV-261 (D. Minn.).

CONCLUSION

The petition for a writ of certiorari should be granted.

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